



Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Secretary Clark:

On behalf of the Business Software Alliance ("BSA"), we hereby submit this comment to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Trade Commission ("FTC" or "Commission") on May 12, 2005, pursuant to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM" or the "Act"). By way of background, BSA member companies are engaged in the creation and dissemination of commercial software and products that are protected by copyright and other intellectual property ("IP") statutes. Accordingly, copyright infringement is a matter of great concern to the BSA and its member companies.

The software industry is seriously threatened by widespread infringement. BSA is actively engaged in efforts to enforce the intellectual property rights of its member companies against such IP violations. An important element of these efforts is electronic mail ("e-mail") notification, through which BSA or its member companies send e-mail notifications to parties (or their ISPs) that the copyright holder or its representatives have reason to believe are engaging in infringing activity with respect to the copyrighted works of member companies.

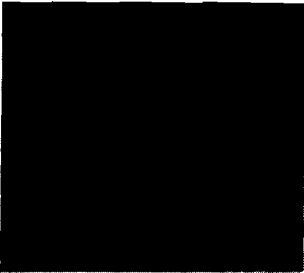
Notices of copyright infringement are an important tool for copyright holders to protect their rights in intellectual property. For example, the law provides that copyright owners may assert their rights by notifying the infringing party of the violation via a "demand letter" or notice letter. NIMMER ON COPYRIGHT, Vol. 6 § 32.01 (2005). Similarly, the Digital Millennium Copyright Act contains a mechanism that permits the holder to assert ownership rights by sending a notice to an internet service provider. 17 U.S.C.A. §512(d)(1)(C)(3) (2005).

These e-mail notification messages, which are invariably sent on an unsolicited basis, generally demand either that the recipients cease and desist from their infringing activity, and/or, in the case of messages sent to entities that act as service providers within the meaning of Title II of the Digital Millennium Copyright Act, 17 USC § 512, request that the recipients remove or disable online access to the infringing material.

BSA believes that it is clear that there is no basis for treating e-mail notification messages described above as having as their primary purpose¹ "the commercial advertisement or promotion of a commercial product or service" within the meaning of the CAN-SPAM Act; these e-mails therefore fall outside of the Act. This result should not change in instances where a notification *also* provides infringers with information on how to obtain legitimate, licensed sources for the copyrighted materials in question. Such an addition to the content of the electronic messages sent by copyright owners or their representatives enhances the educational value of the enforcement campaign, and reduces the necessity for costly and onerous litigation solutions. Clearly, this outcome would promote respect for the law, would discourage illegal activity, and would serve the best interests of consumers in a dynamic, robust online marketplace in copyrighted works.

There is a danger, however, that an e-mail notification message from a copyright owner to an online infringer that includes information about legitimate commercial alternatives to piracy or unauthorized license use could be confused with a message whose "primary purpose" is to advertise or promote a commercial product, and thus fall within the scope of CAN-SPAM. In that case, it would be necessary to include an "opt-out" provision in the infringement notification, leading to an absurd result where violators would be able to avoid further notification by simply opting out of future e-mail from the copyright holder. Such an outcome is exactly the opposite of what Congress clearly intended, as exemplified by its enactment of 17 U.S.C.A. § 512, establishing the notice and takedown process and encouraging copyright owners and service providers to cooperate, rather than litigate, to resolve online infringement problems. The rules should be clarified, specifying that infringement notification e-mails, including those that include information on acquiring legal products, are not subject to the terms of CAN-SPAM.

¹ The Act defines a "commercial electronic mail message" as one "the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet Web site operated for a commercial purpose)." 15 U.S.C. 7702(2)(A).



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We therefore respectfully request that the FTC clarify that e-mail notices of copyright infringement or unauthorized use outside the scope or extent of a valid license do not constitute commercial e-mail and, therefore, do not fall within the scope of CAN-SPAM. Alternatively, we recommend that the FTC find that the transactional or relationship message exemption applies to copyright infringement notices, thereby providing relief from several compliance requirements such as the inclusion of an opt-out mechanism in the body of an e-mail message.

Please contact us if we can provide you with additional information.

Respectfully submitted,

Jennifer Blank
Director of Enforcement

¹ The Business Software Alliance (www.bsa.org) is the foremost organization dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programs foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce. BSA members include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, CNC Software/Mastercam, Internet-Security Systems, Macromedia, McAfee, Microsoft, PTC, SolidWorks, Sybase, Symantec, The MathWorks, UGS and VERITAS Software.

